Supreme Court, U.S.
FILED
APR 21 2003
CLERK

No. 02-1379

In The

Supreme Court of the United States

THE CITY OF BURBANK,

Petitioner,

v.

IRV RUBIN AND ROBERTO ALEJANDRO GANDARA,

Respondents.

On Petition For A Writ Of *Certiorari* To The California Court Of Appeal, Second Appellate District

BRIEF OF *AMICI CURIAE* 80 PUBLIC AGENCIES AND INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION IN SUPPORT OF PETITIONER THE CITY OF BURBANK'S PETITION FOR WRIT OF *CERTIORARI*

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21 pp

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INTEREST OF *AMICI CURIAE*

The *amici*[1] are 80 public agencies located throughout the nation who join together with the International Municipal Lawyers Association ("IMLA")[2] and ask this Court to grant the City of Burbank's petition for *certiorari*.

The *amici* are acutely interested in this case because unwarranted burdens have been imposed on political subdivisions desiring to maintain their legislative prayer practices. The standard articulated in *Rubin v. City of Burbank*, 101 Cal.App.4th 1194 (2002), restricts California legislative prayer practices by forcing censorship of the invocations despite any readily discernible constitutional infirmity. Nationally, governmental entities are concerned that continuing their practices without pre-screening invocations (and barring "sectarian" ones) will expose them to liability for purported Establishment Clause violations. They are equally concerned that conducting the

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[1] In accordance with Supreme Court Rule 37.6, the *amici* state that no counsel for any party authored this brief in whole or in part, and that no person or entity, other than the *amici* and their counsel, contributed monetarily to the preparation or submission of this brief. The parties have consented to the filing of this brief, and, in accordance with Supreme Court Rule 37.3, letters evidencing this consent are being filed concurrently with the Clerk. A list of the *amici* appears in the appendix to this brief.

[2] Since 1935, IMLA has been the primary advocate for the chief legal officers of local governments throughout the United States and Canada. Since its establishment, IMLA has advocated for the rights and privileges of local governments, and the attorneys who represent them. IMLA serves its membership by advocating the nationwide interests, positions, and views of local governments on legal issues. IMLA has appeared as an *amicus curiae* on behalf of its members before the United States Supreme Court, in the United States Courts of Appeals, and in state supreme and appellate courts.

Rubin preview will violate some other state or federal constitutional prohibition. E.g., *Snyder v. Murray City Corp.*, ___ P.3d ___, 2003 WL 1860524 (Utah April 11, 2003) (city with practice allowing legislative prayers could not, after reviewing his proposed prayer, foreclose an atheist from participating because it violated Utah's constitutional neutrality requirement).[3]

Given the intrusive California standard and its confusing interlacement of Establishment Clause and Free Speech rights – especially when juxtaposed with this Court's (and others') neutrality standard (see *infra*) – *amici* fear that many public entities may opt against allowing the traditional legislative prayer. Their alarm is amplified by the unpredictable interpretation, and inconsistent application, of constitutional principles.

So, by abolishing their legislative prayer practices, governmental bodies would no longer need to guess how the multitude of lower state and federal courts would define the scope of "permissible" legislative prayer. But the Constitution does not compel that unmitigated retreat to a non-prayer position, and *amici* would prefer having the right to continue the historical and constitutionally-permissible practice of commencing legislative sessions with an opening prayer.

The *amici* have a profound desire for this Court to impart a uniform standard for legislative prayers, rather

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[3] The *Snyder* opinion is still subject to revision before its release for publication in the permanent law reports; nonetheless, it is referenced here to exemplify the real dilemma facing public entities that allow legislative prayers.

than leaving this important issue to the myriad of federal and state courts who interpret the Establishment Clause differently. This Court's decision on the merits of the instant action will guide all legislative bodies throughout the United States, and ensure that the historical practice may be continued within acceptable, clearly articulated, constitutional bounds.

SUMMARY OF ARGUMENT

The California Court of Appeal's interpretation of both the Court's decision in *Marsh v. Chambers*, 463 U.S. 783 (1983), and the Establishment Clause creates significant confusion and ultimately chills the willingness any public agency may have to maintain its legislative prayer practice. *Rubin* erects a substantial hurdle – likely unnecessary – by requiring a governmental body to examine individual prayers and eliminate "sectarian" content. The *Rubin* directive is amorphous, and its application plainly problematic. Besides identifying the specific reference to Jesus Christ as prohibited sectarian prayer, the *Rubin* court did not provide any insight into what other sectarian expressions would violate the Constitution.

Rubin does not stand alone in its Establishment Clause mystification. Other appellate jurists, often in stark disagreement with members of their court, have related their theories, but no common theme can be deduced from the mélange. This Court should eliminate the confusion and clearly delineate the constitutional borders for legislative prayers.

ARGUMENT

GRANTING *CERTIORARI* IS NECESSARY TO RESOLVE THE UNCERTAINTY ABOUT THE APPROPRIATE CONSTITUTIONAL STANDARDS FOR LEGLATIVE PRAYER, AND TO ABATE THE CHILLING EFFECT CREATED BY THE CALIFORNIA COURT'S MANDATE TO MICRO-MANAGE PROSPECTIVE PRAYERS.

Marsh confirmed the constitutionality of legislative prayers. Further, *Marsh* approved of their 16-year delivery by a clergyman from a single denomination, holding this practice did not advance "the belief of a particular church." 463 U.S. at 793. Now, under *Rubin*, a single prayer could subject the City of Burbank to a contempt citation for violating an injunction prohibiting "sectarian" prayer.[4]

In *Marsh*, the Court upheld the historical practice of commencing legislative sessions with Judeo-Christian prayers offered by a state-paid chaplain, concluding that "the First Amendment draftsmen . . . saw no real threat to the Establishment Clause arising from a practice of prayer

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[4] As Chief Justice Rehnquist recalled, "George Washington himself, at the request of the very Congress which passed the Bill of Rights, proclaimed a day of 'public thanksgiving and prayer, to be observed by acknowledging with grateful hearts the many and signal favors of Almighty God.' Presidential Proclamation, 1 Messages and Papers of the Presidents, 1789-1897, p. 64 (J. Richardson ed. 1897)." *Santa Fe Independent School Dist. v. Doe*, 530 U.S. 290, 318 (2000) (Rehnquist, J., dissenting). Query whether President Washington's expression of thanks to "Almighty God" would pass muster under the California court's new standard – isn't this statement sectarian to all polytheists (e.g., Buddhists, Hindus, Shintoists, to name a few), and now, under California's criterion, constitutionally impermissible?

similar to that now challenged." 463 U.S. at 791. Significantly, the Court refused to parse the content of a *particular* prayer or undertake a sensitive evaluation to ascertain whether the prayer *opportunity* was being used to advance a particular religion.

> "The content of the prayer is not of concern to judges where, as here, there is no indication that the prayer opportunity has been exploited to proselytize or advance any one, or to disparage any other, faith or belief. That being so, it is not for us to embark on a sensitive evaluation or to parse the content of a particular prayer." *Marsh*, *supra*, 463 U.S. at 794-795.

Despite quoting this exact passage (101 Cal.App.4th at 1201), the *Rubin* court demanded a probing of every proposed prayer to parse and ban sectarian invocations. *Id.* at 1204. Below, the City of Burbank contended that references to Jesus Christ in twenty percent of the volunteer's prayers did not advance a single faith. In formulating its rejection, the California court "interpret[ed] *Marsh* to mean that *any* legislative prayer that proselytizes or advances one religious belief or faith, or disparages any other, violates the Establishment Clause." *Id.* (emphasis in original).[5]

But is the standard for the recently-defined California legislative prayer practice truly mandated by the United

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[5] Albeit under an Establishment Clause challenge to a holiday display, *Lynch v. Donnelly*, 465 U.S. 668, 673 (1984), suggests otherwise: "[n]or does the Constitution require complete separation of church and state; it affirmatively mandates accommodation, not merely tolerance, of all religions, and forbids hostility toward any."

States Constitution? The Court's opinion in *Marsh*, which evinces a concern for allowing all religious groups the *opportunity* to provide legislative invocations, seems to suggest that the City of Burbank's practice is constitutional. Otherwise, universal participation in the legislative prayer process is eliminated; members of any religious group whose dogma compels them to proclaim their deity could not give a legislative prayer. Nonetheless, the California court chose inquisition over participation.[6]

In so doing, the state court below blended principles from *Marsh* with other Establishment Clause jurisprudence that have no application to legislative prayer (101 Cal.App.4th at 1202-1203, 1206-1207). Rather, this other line of authority is used to analyze, for example, the constitutionality of school prayer [*Santa Fe*, *supra*, 530 U.S. 290], and religious displays [*County of Allegheny v. ACLU Greater Pittsburgh Chapter*, 492 U.S. 573 (1989); *Lynch*, *supra*, 465 U.S. 668]. While with the District of Columbia Court of Appeals, Justice Ginsburg aptly noted that "the existing legislative prayer practice, *Marsh* plainly indicates, fits into a special nook – a narrow space tightly sealed off from otherwise applicable first amendment doctrine." *Kurtz v. Baker*, 829 F.2d 1133, 1147 (D.C.

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[6] In *Society of Separationists, Inc. v. Whitehead*, 870 P.2d 916 (Utah 1993), the Utah Supreme Court concluded that Salt Lake City's policy – wherein the city explicitly stated that it would "not dictate the form or content of any" volunteer presentation (*id.* at 918) – satisfied the Utah Constitution. In contrast to *Rubin*, the *Whitehead* court determined the constitutional challengers could not succeed because the city had not favored any particular religions or religion in general, but rather "made efforts to assure that a broad cross-section of the community was represented" and no group or individual was denied a realistically equal opportunity to participate. *Id.* at 939.

Cir. 1987) (Ginsburg, J., dissenting), *cert. denied*, 486 U.S. 1059 (1988);[7] see also, *Marsh*, 463 U.S. at 796 (Brennan, J., dissenting) (describing the majority decision in *Marsh* as "carving out an exception to the Establishment Clause" to "accommodate legislative prayer"). *Rubin*, it appears, cluttered that nook.

Now, the City of Burbank and all California governmental bodies must "sensitively evaluate" and "parse the content" of prayers to ensure that they are not sectarian. However, other than making sure that Jesus Christ is not mentioned, the *Rubin* court offers no guidance for the legislative bodies to follow. How sensitive must the evaluation be? How much parsing of a prayer is necessary to satisfy the Establishment Clause? Is it enough for a governmental body to provide all religious groups the *opportunity* to open its legislative sessions with a prayer? Is it sufficient that the religious group leaders rotate, or that the leaders – without any input from the public entity – select the order of prayer presentation? These are but some of the many unanswered questions that this Court could address by granting the City of Burbank's petition.

The California appellate court is not the only source of confusion. Many other courts contribute, too, when they turn to *Marsh* for guidance even though they are not

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[7] *Kurtz* involved a "secular humanist" who challenged the refusal of U.S. Senate and House chaplains to invite a non-believer to the morning prayer sessions and allow him to deliver remarks that did not invoke any deity. Although the majority vacated the judgment and remanded the case with directions to dismiss for lack of subject matter jurisdiction, Justice Ginsburg dissented from the majority's standing disposition and would have affirmed the judgment as correct under *Marsh*.

addressing legislative prayer disputes. Their decisions reflect diverging interpretations of *Marsh* and disagreement about its application to various Establishment Clause issues.

The incertitude was recently highlighted in a single opinion. *Snyder v. Murray City Corp.*, 159 F.3d 1227 (10th Cir. 1998) (*en banc*), *cert. denied*, 526 U.S. 1039 (1999). *Snyder* arose after an individual was denied the opportunity to give a prayer because of its content, namely, a "prayer" beseeching the city officials to stop using religion in public affairs. The decision reflects three pools of thought.[8]

The *en banc* majority in *Snyder* rejected the proponent's claim that the denial resulted in the preference of one religion over another. It deemed his prayer to "aggressively advocate" his belief in the "sacrilegious nature of governmental prayer" which constituted impermissible proselytizing. 159 F.3d at 1235.

Snyder's concurring opinion found that the majority improperly extended *Marsh* to allow the government to censor and bar certain prayers. However, after determining that the city could not engage in liturgical supervision, the concurring judge ruled that the plaintiff could not seek the requested relief (i.e., the right to articulate a proselytizing legislative prayer), which itself would violate the Establishment Clause. *Id.* at 1236, 1242. *Cf.*, *Santa Fe*, *supra*, 530 U.S. at 305-306 (applying "content neutrality"

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[8] The waters have become even murkier. As noted above, the Utah Supreme Court just ruled that the Murray City policy violated Utah's Constitution. *Snyder v. Murray City Corp.*, ___ P.3d ___, 2003 WL 1860524 (Utah April 11, 2003).

requirement to school district policies); *Lamb's Chapel v. Center Moriches Union Free School Dist.*, 508 U.S. 384, 394-396 (1993) (rejecting argument that allowing church to show religious film on school property – which otherwise was open to a wide array of activities – would violate the Establishment Clause, and holding that the Free Speech Clause requires governments to accommodate all religious viewpoints when religious speech is constitutionally-permissible).

The *Snyder* dissent found the city's content-based rejection of a particular prayer violated the Establishment Clause's neutrality guarantee. *Id.* at 1243, 1246. *Cf.*, *Santa Fe, supra*, 530 U.S. at 305-306 (holding school district's policy that permitted only "nonsectarian, non-proselytizing prayer" was unconstitutional, noting the single student (voted by a majority) provided season-long invocations, thereby precluding the minority candidates from expressing their views and sharing their diverse speech; *Board of Regents of Univ. of Wis. System v. Southworth*, 529 U.S. 217, 235 (2000) ("The whole theory of viewpoint neutrality is that minority views are treated with the same respect as are majority views."); *School Dist. of Abington Township v. Schempp*, 374 U.S. 203, 226 (1963) ("In the relationship between man and religion, the State is firmly committed to a position of neutrality.").

The contrasting judicial approaches to prayer analysis are also reflected in the Sixth Circuit's published denial of a rehearing *en banc*. *Coles v. Cleveland Board of Education*, 183 F.3d 538 (6th Cir. 1999). Initially, the three-judge panel evaluated the constitutionality of the education board's practice of opening meetings with prayers (many of which mentioned Jesus by name). *Coles v. Cleveland Board of Education*, 171 F.3d 369, 384 (6th Cir. 1999). In a

divided opinion, the majority opted to apply *Lee v. Weisman*, 505 U.S. 577 (1992), and *Lemon v. Kurtzman*, 403 U.S. 602 (1971), rather than *Marsh*, to hold the prayer practice unconstitutional (171 F.3d at 380-386); the dissent, using *Marsh*, found no constitutional violation (*id.* at 389).[9]

Then, six judges dissented from the order denying rehearing *en banc*, led by Judge Boggs who specifically wrote to "call attention to the implication of the panel majority's determined drive to erase the possibility of any inclusion of a request for divine guidance in the solemnization of at least this species of public meeting." 183 F.3d at 542. Further, he stated, "What a crabbed view of the nature of humanity is implied by the notion that the Constitution would forbid one of the members to choose to express inspiration from the Torah, Koran or Book of Common Prayer!" *Id.*

Although current California law, including the injunction under which the City of Burbank is monitored, prohibits "sectarian" prayer, all prayer is by nature sectarian to a degree – each prayer, at least implicitly if not overtly,

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[9] Several years ago, a district court in California published its order denying a motion for preliminary injunction brought by teachers against a school board, which opened its meetings with a religious prayer. *Bacus v. Palo Verde Unified School Dist. Bd. of Educ.*, 11 F.Supp.2d 1192 (C.D. Cal. 1998). The district court applied the *Marsh* analysis and, of particular note, rejected the teachers' contention that the invocations in issue were overtly sectarian because they frequently referred to Jesus or Jesus Christ. *Id.* at 1197, quoting *Marsh*, *supra*, 463 U.S. at 794-795. But the Ninth Circuit Court of Appeals added to the confused state of the law on this issue by reversing the district court in an *unpublished* memorandum. *Bacus v. Palo Verde Unified School Dist. Bd. of Educ.*, 52 Fed.Appx. 355, 2002 U.S.App. LEXIS 24552 (9th Cir. 2002).

reflects the teachings of a particular denomination. Similarly, prayers can be sectarian simply by virtue of the manner in which they are offered by Buddhists, Taoists, Sikhs, Jains, Hindus, Muslims, or members of any of the numerous other religions – even if the name of a deity is not uttered.

Forty years ago, the Court recognized the existence of 83 religious bodies with membership greater than 50,000, and innumerable smaller groups. *Abington*, *supra*, 374 U.S. at 214. Unquestionably, the number of religious groups and sects in this country has grown over the last four decades. In an interview, which ran in the June 22, 2001 edition of *Religion & Ethics Newsweekly*, Harvard Professor of Comparative Religion and Indian Studies, Diana Eck, indicated that the United States has "become the most religiously diverse nation on earth." http://www.pbs.org/wnet/religionandethics/week443/profile.html. Professor Eck noted the fact that American Christians "are pretty abysmally ignorant about the religious traditions of the rest of the world." *Id.* To better comprehend one religion, Buddhism, she suggested "that Christians [] get out there and understand what it means for a vibrant, religious tradition that has transformed the whole of Asia and now is beginning to transform America – what it means for a vibrant religious tradition not to use the symbol 'God' in the way we do." *Id.*

Yet, the *Rubin* standard stymies such an effort. If governmental agencies ended their legislative prayer practices, then groups like the nondenominational Burbank Ministerial Association will lose a prime opportunity

for unifying community fellowship, which enables members of the association, as well as the public at large, to share their respective religions.[10]

Another important reason to grant *certiorari* here stems from the *Rubin* court's failure to adequately explain how its ruling – which requires the city to interject itself into the prayer process and censor certain prayers – is viable under the Establishment Clause's prohibition against government entanglement in religion. Equally problematic is the California court's nonobservance of the Establishment Clause's neutrality requirement; *sub silentio*, the *Rubin* decision forces California entities to discriminate against religious groups that invoke their deities by not allowing them to participate in the legislative prayer process. This disparagement sparks its own Establishment Clause imbroglio.

Additionally, if the *Rubin* decision is allowed to stand, legitimate Free Speech considerations must be addressed. The California opinion mandates censorship of certain religious speech, *viz.*, the prayers of those compelled to pray in the name of their deity. The California appellate court was satisfied that its content-based censorship was

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[10] Although the Burbank Ministerial Association may not have the largest cross-section of religions within its current membership, a city like Flushing, Queens, New York does. See Profile of Diana Eck, comment of scholar R. Scott Hanson, http://www.pbs.org/wnet/religionandethics/week443/pluralism.html (noting that in June 2001, a few square miles in Flushing had Hindu and Buddhist temples, Sikh Gurdwaras, Muslim mosques, Reform, Conservative and Orthodox Jewish synagogues, Catholic churches (which conducted services in English, Spanish and Chinese), and Protestant churches of "every denomination abound, including over 100 Korean (mainly Presbyterian) churches alone.").

mandated by the Establishment Clause and that its ruling survived the First Amendment's Free Speech protections. *Amici* are not as convinced. See *Santa Fe*, *supra*, 530 U.S. at 302 ("there is a crucial difference between *government* speech endorsing religion, which the Establishment Clause forbids, and *private* speech, which the Free Speech and Free Exercise Clauses protect.") (emphasis in original). This Court should provide necessary guidance on this point, too.

CONCLUSION

The potential chilling effect of the California Court of Appeal's decision, and the evident confusion in the law addressing this important Establishment Clause issue, has prompted a number of public entities and IMLA to join the City of Burbank in urging this Court to enunciate the appropriate constitutional standards governing legislative prayers. Accordingly, *amici* support the granting of a writ of *certiorari* in this matter.

Respectfully submitted,

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PARTICIPATING AMICI CURIAE

Organizations

International Municipal Lawyers Association

U.S. Cities

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City of Atascadero	California
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City of Temple City	California
City of Turlock	California
City of Vacaville	California
City of Victorville	California
City of Vista	California
City of Wasco	California
City of Waterford	California
City of Woodland	California
City of Colorado Springs	Colorado
City of Pueblo	Colorado
City of Trinidad	Colorado
City of Hartford	Connecticut
Leon County	Florida

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City of Middleton	Idaho
Village of Bolingbrook	Illinois
Village of South Holland	Illinois
City of Methuen	Massachusetts
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